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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 525

PHILIP V. AMES and RUTH HASKIN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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OCTOBER TERM, 1957

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PHILIP V. AMES and RUTH HASKIN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners, Philip V. Ames and Ruth Haskin, pray that a Writ of Certiorari issue to review a judgment of the District Court of Appeal of the State of California, Second Appellate District, whereby the judgments of conviction and orders denying the motion for a new trial by the Superior Court of the State of California in and for the County of Los Angeles, were affirmed.

Opinions Below.

The trial court rendered no opinion.

The opinion [R. III ....][1] of the court below is reported at 151 A. C. A. 788, 312 P. 2d 1111. It is set out hereinafter as Appendix "A". The order correcting the opinion, or modifying same [R. III, Appendix "B"

[1]The Record is in three volumes. Reference will be made to the volume, as well as the page, where the reference is found.

to Petition for Hearing in Supreme Court of California], is reported at 152 A. C. A. 318, 312 P. 2d 1111 (opinion as modified). It is set out hereinafter as Appendix "B". The judgment of the court below, per the practice in California, is the last sentence of the opinion [R. III; App. "A" 27]. It reads: "The judgment is affirmed."

Jurisdiction.

1. The judgment of the District Court of Appeal was dated and entered June 14, 1957 [R. III, Pet. for Hear., App. "A"]. The said judgment was modified or corrected on July 12, 1957 [R. III, Pet. for Hear., App. "B"].

2. Petition for Rehearing in the District Court of Appeal was denied on July 9, 1957 [R. III, Order Denying Petition for Rehearing] (152 A. C. A. No. 2 Minutes p. 3).

3. Petition for Hearing in the Supreme Court of California was denied August 6, 1957, Justices Schauer and Carter being of the opinion that the petition should be granted [R. III, Order Denying Hearing; 48 A. C. 24, Minutes p. 2]. No extension of time within which to petition for certiorari has been requested.

4. The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 2101(d) and Rule 22(1) of this Court.

Questions Presented for Review.

1. Where police officers have had a doctor of standing, with an extensive medical practice, including being on the staff of a busy hospital (Opinion of the District Court of Appeal, App. "A", 312 Pac. Rep. 2d 1111-1112), and having deep roots in the community, under surveillance for one

year, said officers having had information concerning the doctor from the Board of Osteopathic Examiners for the preceding two or three years; they also having had information from the District Attorney's investigators as far back as five years, does a search of all the rooms of the doctor's offices, without a warrant, at the time the officers arrested the doctor for the crime as to which they have had him under surveillance (abortion), violate the due process clause of the 14th Amendment and constitute an unreasonable search and seizure under the Fourth Amendment?

2. Is a fair trial denied, and due process violated, where the Court permits to be submitted to the jury, over the objection of the defendant, evidence on the issue of the reasonableness of the search and seizure which is inflammatory, prejudicial and hearsay, said evidence having no bearing on the proof of the crimes charged?

Constitutional Provisions Involved.

Section 1 of the 14th Amendment to the United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; . . ."

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Statement of the Case.

Manner Federal Questions Were Raised and Rulings Thereon.

Question Number I sought to be reviewed was presented in the trial court at the outset by a motion [R. I. pp. 12-14] to set aside the information under California Penal Code, Section 995[2], and, also, prior to the commencement of evidence, by a motion [R. I. Clk. Tr. pp. 24-26] to suppress evidence on the ground that said evidence was "obtained by the officers in violation of the Fourth Amendment to the United States Constitution and, therefore, amounts to a denial of due process of law and a violation of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" [R. I, Rep. Tr. p. 8].

Said motions were denied [R. I., Clk. Tr. p. 14; R. II, 288].

Both questions were further presented in the trial court by way of objection to the introduction of the evidence [R. 11, p. 976]. Said objection was overruled (*Ibid.*) as to Question Number 2, petitioners further made a motion for mistrial [R. II. p. 1032; Clk. Tr. p. 31; R. I.] Said motion was denied [R. I. Clk. Tr. 32; R. III, 1282]. After the verdict of the jury the matter was further presented by way of Motion for New Trial, one of the grounds of which was [R. I. Clk. Tr. pp. 243-244] "that the searches and seizures at the offices of Dr. Ames were in violation of the Fourth Amendment to the Constitution of the United States. . . . It amounted to a denial of due process of law. The motion also stated as a ground the submission to the jury of the evidence bearing

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[2]That section provides that an information must be set aside by the court on motion of the defendant where "the defendant has been committed without reasonable or probable cause."

upon the reasonableness of the search and seizure. Said motion was denied [R. I, Clk. Tr. p. 248; R. III. p. 1489].

The matter was presented to the District Court of Appeal and to the California Supreme Court in the briefs and Petitions on Appeal [R. III, Ames Op. Br. pp. 69-72; Resp. Br. pp. 60-63; App. Clos. Br. pp. 3-6; Pet. for Rehear. p. 11; Pet. for Hear. in California Supreme Court, 23, 24; Brief of Amici Curiae in Support of Petition for Hearing, p. 3].

In its opinion, the District Court of Appeal said (151 A. C. A. 788, 791; 312 P. 2d 1111-1113; App. "A" p. 3):

> " '(U)nreasonable search and seizure' constituted the major portion of the defense at the trial and is now the principal ground for reversal. . . . ."

That Court also upheld the submission of the evidence to the jury on the ground that petitioners had invited the error (App. "A", p. 3; 312 P. 2d 1111-1116).

Facts Material to a Consideration of the Questions Presented.

Petitioner, Philip V. Ames, now standing convicted of abortion, is a licensed osteopathic physician, graduated from a well known university, with training in the Los Angeles College of Osteopathic Physicians and Surgeons, with internship at the Los Angeles County General Hospital [R. II, p. 1137]. He practiced his profession in Los Angeles since 1943; he was a general practitioner and maintained a well equipped office on Sunset Boulevard containing rooms for treatment [R. II. pp. 1137-1139]. He was on the staff of a well known hospital and attended at numerous such institutions [R. II. p. 1139]. He had practiced considerably in the treatment of women's diseases, vaginal disorders and obstetrics [R.

II, pp. 1140-1143]. He had another office on Santa Monica Boulevard some distance from his Sunset Boulevard office, where he catered to persons in the westerly end of Los Angeles [R. II, pp. 1143-1144].

In his Sunset Boulevard office he maintained records covering the histories of some 2,000 patients [R. II, pp. 1147-1149]. Petitioner, Ruth Haskin, is the doctor's sister and was his employee, working as a nurse and attendant at his office [R. II, p. 1161].

The officers had had Dr. Ames under surveillance for over a year [R. II, p. 977] they had information concerning the alleged illegal activities from the Board of Osteopathic Examiners in the preceding two or three years [R. II, p. 977], and they had like information for the District Attorney's investigators for five years [R. II, p. 977].

At no time did the officers have any warrant, either for arrest or for search [R. I, Rep. Tr. pp. 125-126]. The day of the arrest was February 10, 1955 [R. II, p. 961] and the time of day was 1:30 p. m. [R. I., Rep. Tr. pp. 62-63]. It was a Thursday. Although the Courts were open, the officers made no attempt to get a warrant of any kind. [R. I, Rep. Tr. pp. 125-126].

The officer went into the building where the doctor's offices were. The offices consisted of a reception room through which one went into a hall on either side of which were about five examining rooms and a rest room. [R. I, Rep. Tr. pp. 121-122]. The officer waited for the doctor. He first saw the doctor in the hall when he came out and told him he was under arrest and to sit in one of the offices [R. I, pp. 12, 14]. At that point, though the doctor was under arrest, instead of taking the doctor before a magistrate, he made the doctor sit in this office or room

for two hours [R. I, Rep. Tr. p. 63] while the officer searched the entire premises, not merely the hall where the arrest was made, nor even the room where the doctor was told to sit [R. I, Rep. Tr. pp. 70, 15, 16, 41, 61, 17, 21; 72, 73, 155]. The search consisted of, *inter alia*, searching the doctor's desk [R. I. pp. 15-16], filing cabinet [R. I, p. 17] and index files containing the names, address, treatment and other doctor-patient relationship information.

From this search evidence was obtained in the form of index cards with the names of patients [R. I. p. 74] who were then called as witnesses [R. I, Rep. Tr. pp. 141-142] as well as documents and a check which were introduced into evidence [R. I, p. 133] and relied upon strongly by the Court below in affirming (App. A. pp. 15-16; 312 P. 2d 1111-1118).

"There was no witness who testified that he or she saw Ames abort any of the women. (Opinion District Court, App. A, p. 3; 312 P. 2d 1111-1113.) There was no testimony by anybody that the doctor either administered a medicine to any patient involved herein or used an instrument to remove tissue from the woman's uterus. There was no proof that a foetus was ever seen in his office, or that the doctor ever admitted that an embryo had been removed. The State relied largely on inferences to be drawn from the circumstances of the case [R. III, Opinion of the Court below, Appendix A to the Petition for Hearing in the Supreme Court of California, reported at 151 A. C. A. p. 788; Appendix "A" attached hereto, App. p. 3].

It was a close case, relying largely on circumstantial evidence, and the jury deliberated for approximately five days before reaching a verdict. They apparently were in

a quandary, for they had evidence read to them; they asked for additional instructions and clarification of some that had been given [R. I, Clk. Tr. pp. 33-38]. During the deliberations, the jury asked for the reading of additional testimony, and additional instructions were given [R. I, Clk. Tr. pp. 119-120].

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

This Court Has Never Passed Upon the Question of the Validity of a State Court Conviction Based Upon Evidence Illegally Obtained, Such Conviction Being in a State Which Follows the Federal Exclusionary Rule.

At the time of this Court's decision in *Irvine v. California*, 347 U. S. 128, California held to the non-exclusionary rule. Thereafter, in April 1955, California adopted the federal, or exclusionary, rule (*People v. Cahan*, 44 Cal. 2d 434; *People v. Berger*, 44 Cal. 2d 459).

The case at bar was tried under the exclusionary rule, the trial court and the Court below holding that the evidence was not illegally obtained.

This Court, and all the justices thereof who have passed upon the question, whether with the majority or with the dissent, have made clear their view that the guarantee against unreasonable searches and seizures, embodied in the Fourth Amendment, is a part of the Due Process Clause of the 14th Amendment, whether stated in terms of being "implicit in 'the concept of ordered liberty'" (*Wolf v. Colorado*, 338 U. S. 25, 27; *Stefanelli v. Minard*, 342 U. S. 117, 119] *Irvine v. California*, 347 U. S. 128, 132), or in terms of the Fourth Amendment being applic-

able to the states (dissenting opinions in *Wolf v. Colorado*, 338 U. S. 25, 40, 41, 47; dissenting opinion in *Stefanelli v. Minard*, 342 U. S. 117, 125; concurring and dissenting opinions in *Irvine v. California*, 347 U. S. 128, 138, 151, 152).

In *Wolf and Irvine*,[3] the majority of this Court refused to upset, as violative of the Due Process Clause of the 14th Amendment, convictions in which illegally obtained evidence had been admitted. The rationale of these decisions was that the exclusionary rule is not a constitutional command, but is a rule of evidence and that so long as the state provided (by criminal proceedings or suit in trespass for damages) methods of vindication of the right against arbitrary police intrusion of privacy, state convictions so obtained would not be set aside under the 14th Amendment.

However, in the *Wolf* case, this Court said (338 U. S. 25, 28):

> ". . . (W)ere a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

In *Stefanelli*, this doctrine was adhered to (342 U. S. 117, 119).

The case at bar comes to this Court within the doctrine of the *Wolf* case. For, by its adoption of the exclusionary rule, but nevertheless holding the admitted evidence not to have been obtained in violation of the constitutional right against arbitrary incursion into privacy,[4] California

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[3] *Stefanelli* went off on the theory of the restraint to be exercised by the Federal Courts in interfering with the administration of state criminal prosecutions.

[4] The question as to whether the evidence was illegally obtained will be discussed below under Point II.

has affirmatively sanctioned a violation of the 14th Amendment.

In *Irvine* this Court said (347 U. S. 128, 134) that with the *Wolf* doctrine being known, the "state courts may wish further to reconsider their evidentiary rules. But to upset state convictions before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power." As seen, California has had an opportunity to reconsider its evidentiary rule and has, indeed, changed it.

Accordingly, the case comes to this Court ripe for consideration as to whether there has been an unconstitutional application of the search and seizure guarantee in the same manner as if any other constitutional guarantee were involved.[5]

As we read the last quoted statement from the *Irvine* case, we believe this Court was saying that if, after *Wolf*, a state did adopt the exclusionary rule, the question as to whether the evidence was illegally obtained would be reviewed by the Court. This is such a case. The proposition involved is an important one and has not been passed upon by the Court. Certiorari should be granted to pass upon and establish the principle.

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[5]*E.g.* freedom of press (*Near v. Minnesota*, 283 U. S. 697); right to counsel in criminal cases (*Powell v. Alabama*, 287 U. S. 45); freedom of speech (*DeJonge v. Oregon*, 299 U. S. 353); freedom of religion (*West Virginia Board of Education v. Barnette*, 319 U. S. 624); coerced confessions (*Brown v. Mississippi*, 297 U. S. 278).

II.

The Court Below Has Decided Federal Questions of Substance in a Way Probably Not in Accord With Applicable Decisions of This Court.

Preliminary Statement.

If, as we believe, we are correct that this Court will review the question as to whether the evidence was illegally obtained, the cases in which this Court has reviewed the questions in federal prosecutions are in point, for the illegal search and seizure question is the same.

A.

The Decision Below Disregarded the Distinction Between Merely Evidentiary Materials Which May Not Be Seized During the Course of a Search Incident to a Lawful Arrest and Those Objects Which May Be, Such as the Instrumentalities and Means by Which a Crime Is Committed, Fruits of the Crime, Weapons by Which Escape Might Be Effected and Contraband.

The evidence introduced at the trial as a result of the search consisted of pieces of paper in the doctor's handwriting [R. I, p. 33], a check [R. I. pp. 133, 137], a piece of stationary [R. I. p. 133] information cards from the doctor's filing card system [R. I, p. 133], the same serving as a basis for the police to call as witnesses certain patients unknown to them before [R. I. p. 133], and an envelope from one of the alleged abortees [R. I, p. 133; Opinion App. "A" p. 19], all of which figured substantially in the case (Appendix "A", pp. 13-14) (312 P. 2d 1111-1117-1118).

None of these items, however, all seized, it will be remembered, without a warrant, was either an instrumen-

tality or means by which the alleged crimes were committed, nor were they the fruits of the crime, such as stolen property, nor were they weapons by which escape might be effected, nor were they objects the possession of which was itself illegal.

Accordingly the officers had no authority to search for or seize them and the constitutional right to be free from the invasion of privacy was violated.[6]

B.

The Extent to Which a Search Without a Warrant, on the Pretext of Being Incident to a Lawful Arrest, Should Be Permitted, Should Be Re-examined by This Court.

As decisions[7] of this Court, including the dissenting opinions therein, demonstrate, the questions as to what can be searched, what can be searched for, how much and what can be taken in a search without a warrant, are troublesome and important questions which invariably invoke widely differing views as to the scope of the Fourth Amendment. *Kremen v. United States*, 353 U. S. ....., demonstrates that law enforcement officers have interpreted *United States v. Rabinowitz*, 339 U. S. 56, as giving *carte blanche* to search anywhere and take anything on the pretext of a search incident to a lawful arrest. The requirement for a search warrant—the theory of the desirability of having a magistrate determine the permissibility and the scope of searches and seizures

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[6] *Harris v. United States*, 331 U. S. 145, 154; and cases cited in note 17.

[7] *E.g., Co-Bart Importing Co. v. United States*, 282 U. S. 344; *United States v. Leftkowitz*, 285 U. S. 452; *Harris v. United States*, 331 U. S. 145; *Trupiano v. United States*, 334 U. S. 699; *United States v. Rabinowitz*, 339 U. S. 56; *Kremen v. United States*, 353 U. S. .....

(*United States v. Leftkowitz*, 285 U. S. 464)—seems to have been entirely forgotten.[8]

In the case at bar there was no reason why a search warrant should not have been obtained. It is clear that under *Trupiano v. United States*, 334 U. S. 699, the search and seizure here were illegal. It is true that by a divided court *United States v. Rabinowitz*, 339 U. S. 56, 66, overruled *Trupiano* "to the extent that (that case) requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest," but in the light of the use to which *Rabinowitz* has been put, this Court may want to take another look at the question. The rule announced in *Rabinowitz* appears to do violence to the principle that searches without warrants should be allowed only in exceptional circumstances (*Johnson v. United States*, 333 U. S. 10, 14, 15) and only when compelling reasons are shown for the absence of a warrant (*McDonald v. United States*, 335 U. S. 451, 454).

Moreover, *Rabinowitz* recognized that *Go-Bart Importing Co. v. United States*, 282 U. S. 344, and *United States v. Leftkowitz*, 285 U. S. 452, are still the law (339 U. S. 56, 62). Those cases were distinguished on the ground

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[8]California cases since *Cahan* illustrate the same tendency. (*People v. Ferrera*, 149 A. C. A. 956, 209 P. 2d 533; *People v. Lawrence*, 149 A. C. A. 501, 308 P. 2d 821; *People v. Chong Wing Louie*, 149 A. C. A. 196, 207 P. 2d 929; *People v. Guerrera*, 149 A. C. A. 142, 307 P. 2d 940; *People v. Holland*, 148 A. C. A. 953, 307 P. 2d 703; *People v. Steinberg*, 148 A. C. A. 878, 307 P. 2d 634; *People v. Littlejohn*, 148 A. C. A. 813, 307 P. 2d 425; *People v. Penson*, 148 A. C. A. 565, 307 P. 2d 24; *People v. Garnett*, 148 A. C. A. 275, 306 P. 2d 571; *People v. Triche*, 148 A. C. A. 199, 306 P. 2d 616; *People v. Cannon*, 148 A. C. A. 163, 306 P. 2d 589; *People v. Vice*, 147 A. C. A. 330, 305 P. 2d 270; *People v. Ruiz*, 146 A. C. A. 678, 304 P. 2d 175).

that in *Rabinowitz* the search was not general or exploratory for whatever might be turned up. The officers were searching specifically for stamps overprinted illegally. Such is not the case at bar. The search here was only general and exploratory for whatever might be turned up. The search was precisely of the type which has been condemned as violative of the Fourth Amendment. It is not reasonable to allow, as incident to an arrest for the crime here charged, rummaging through all the rooms of the doctor's office, his desk, his filing cabinets, his confidential records of patients. This type of a search and seizure goes far beyond the search of a person at the time of the arrest to prevent his escape or to prevent harm to the arresting officer and it goes far beyond allowing a search and seizure of that which is in open and physical relation to the person so as to be practically an extension of the person.

While the instant case does not involve the seizure of the entire contents of the premises, as in *Kremen v. United States*, 353 U. S. ....., the intrusion into privacy was here just as great. The *Kremen* case held the seizure there went beyond any authorized by previous decisions of this Court, but the case did not set down standards limiting or explaining the sweep of the *Rabinowitz* decision.

Certiorari should be granted to clearly define the scope of *Rabinowitz*, if not to reconsider it.

C.

Petitioners Were Denied a Fair Trial in Violation of Due Process of Law.

Over objection of petitioners [R. II, pp. 967, 1026, 1033] the trial court, on the theory of having the jury pass upon the legality of the search and seizure, allowed to be placed before the jury testimony of the police officers of a highly inflammatory, hearsay and prejudicial nature, not material or admissible as proof of the crimes charged. For example, officer Zander was permitted to testify [R. I, p. 977]:

1. that he had observed activities at the Santa Monica Boulevard office "for the days preceding the 10th";

2. he had information he had received from the Board of Osteopathic Examiners in the preceding two or three years;

3. he had information from George Ruppers (an officer);

4. he had information from the District Attorney's investigators;

5. he had information from a television program;

6. he had information from anonymous telephone calls;

7. he had information for the allegedly aborted women given to his fellow officers.

At the same time petitioners were denied the right to be confronted by such persons and the right to cross-examine them.

Petitioners were helpless and had to sit idly by while the jury was thus being prejudiced against them. The entire prosecution became tainted by this conduct.

We earnestly contend that this amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is conceded by both respondent [R. III, pp. 63-64, Resp. Br.] and the Court below (App. "A", p. 11) that it was error to submit the reasonableness of the search and seizure and the evidence pertaining thereto to the jury. The Court below attempted to save the conviction, however, by asserting that petitioners invited the error. The record does not so show.[9]

It is not our desire to unduly prolong this petition, but we have assembled in Appendix "C" excerpts from the record which clearly show that it was the trial court's belief that he should submit this matter of "reasonable cause" to the jury, and that neither the Court, the District Attorney, nor counsel had the guidance of any authority in California as to whether this was proper, and all were uncertain as to what to do.[10] Nevertheless, counsel for these petitioners objected vigorously to every word of this testimony going to the jury on the issue of reasonable cause.

The record was fully protected by continuous objections. For instance, when Officer Zander was first called on the

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[9]The trial court said, and this was recognized by the court below in its opinion (Appx. A):

"The Court: Just so we are clear on what we are doing. You may want to take the matter up and I want the record clear as to what is going on. *Nobody is waiving anything and the court is not asking them to.*" (Emphasis ours.) [Certified Record, Vol. II, Rep. Tr.]

[10]"The Court: We are cutting the timber, we might say, and not shooting in the dark, but cutting the timber." [Certified Record, Vol. II, Rep. Tr. p. 972.].

See Appendix "C" for a full statement of the record on this issue.

issue of probable cause, objection was promptly made [R. II, p. 961].[11]

It is fundamental to the doctrine of due process that no Court shall deprive any party of a substantive right arbitrarily or capriciously, and this Court has been zealous in examining the records of litigation carried on in State Courts where there is a showing that a reasonable basis exists for supposing that rights guaranteed by the Federal Constitution have been denied or ignored.

Dixon v. Duffy, 344 U. S. 134, 145;

Jennings v. Illinois, 342 U. S. 104.

We believe that a conviction obtained with such disregard of considerations of fundamental fairness violates due process just as much as did the conviction in *Rochin v. California*, 342 U. S. 165. It is true that in *Rochin* there was physical brutality involved, but as we read the case, it is not so narrowly confined. The case is a landmark in holding that a State cannot obtain a conviction by the use of methods that offend civilized standards of fairness and decency. We suggest that decency and fairness are not to be measured in terms only of physical force. If, as here, a conviction is obtained by unfair means, such as permitting inflammatory material not going to the proof of the crime charged to go to the jury and thus to prejudice it, standards of decency have been offended and the conviction should not be allowed to stand.

At the very least, this Court should grant a hearing to examine this fundamental question.

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[11]In the course of our objections, this was said:

"Mr. Parsons: So there won't be any mistake about this, we want the record to show that we object to the testimony of Zander." [Certified Record, Vol. II, p. 967.]

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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RUSSELL E. PARSONS,
Attorneys for Petitioners Philip V. Ames and Ruth Haskin.

HERBERT GROSSMAN,
Of Counsel for Petitioner Ruth Haskin.

A. L. WIRIN,
FRED OKRAND,
Of Counsel.

APPENDIX "A".

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, v. Philip V. Ames and Ruth Haskin, Defendants and Appellants. Crim. No. 5677. Filed June 14, 1957.

Appeal from the Superior Court, Los Angeles County, Herbert V. Walker, Judge.

Murray M. Chotiner and Russell E. Parsons for Appellant Philip V. Ames. By Murray M. Chotiner.

Grossman & Rosen for Appellant Ruth Haskin. By Joseph M. Rosen.

Edmund G. Brown, Attorney General, James L. Mamakos, Deputy Attorney General, for Respondent.

Convicted of having aborted nine[1] expectant mothers, defendants Ames and Haskin separately seek to upset the judgments on the grounds of (1) insufficiency of the evidence, and (2) errors in rulings at the trial.

Philip Ames is a licensed osteopathic physician and has practiced his profession in Los Angeles since 1943. He is a graduate in liberal arts from a popular university, and osteopathy from a college dedicated to that school of thought. He took training at the Los Angeles College of Osteopathic Physicians and Surgeons and interned for a year at the Los Angeles County Hospital. From the incipiency of his practice he has operated alone as a general practitioner and has maintained a well-equipped

[1]Mrs. Haskin was convicted on three counts only.

office on Sunset Boulevard containing rooms with two machines for administering diathermy and two for ultrasonic treatments; two machines for cauterizing, one for making electro-cardiograms, and one for generating X-ray. He is on the staff of a busy hospital and performs the functions of his profession at a number of such institutions. He has drifted into the treatment of women's diseases, specialized in vaginal disorders and obstetrics. In 1954 he rented an office at 8001 Santa Monica Boulevard, several miles nearer the ocean, where he installed a telephone and met patients by appointment. He installed equipment there similar to that in his Sunset Boulevard office.

In February, 1955 there were records of about 2000 patients at the Sunset office. An employee in both places was his sister, Mrs. Haskin, who figures prominently in the activities under consideration. She worked as a nurse for a salary and checks were issued to her for take-home pay.

For one year prior to January 1955, the police department of Los Angeles had Dr. Ames under surveillance. Many reports of his abortion practice had been received. In January a concerted watch was kept over his Sunset office and at times over 8001. During that period, many women were observed entering both premises. Also, Dr. Ames was seen as he visited 8001, but his name did not appear on the door, and he visited it only by special arrangement. Mrs. Haskin was present there at the time of each of the doctor's visits. However, he ordinarily conducted his medical and surgical services at the Sunset office.

On the morning of February 10, police officers took into custody three women as they were leaving 8001 and

transported them to the Los Angeles City Hall. There the women confessed that they had been aborted by Dr. Ames with the assistance of Mrs. Haskin. After that fact had been communicated to Officer Zander, he proceeded to the Sunset office and placed Dr. Ames under arrest. Then he made a search of those premises, took possession of large number of pieces of paper, each containing words in the doctor's handwriting, a $50 check, a piece of stationery and a key. Thereafter Officer Zander searched the Santa Monica Boulevard office from which he removed a large number of items customarily kept by a physician. Because the officer had no search warrant, no attempt was made to introduce such articles at the trial. Inasmuch as "unreasonable search and seizure" constituted the major portion of the defense at the trial and is now the principal ground for reversal, a discussion of that topic will be deferred until after the "sufficiency of the evidence" has been explored.

Evidence Sufficient

There is no witness who testified that he saw Dr. Ames abort any one of the women who testified that they had been aborted. Not even Mrs. Haskin admits that the doctor either administered a libation to a patient or used instruments to remove living tissue from a woman's uterus. There is no proof that a foetus was ever seen in his office or that either appellant ever admitted that an embryo had been removed. In the absence of such proof, the State is forced to rely upon inferences reasonably drawn from the circumstances placed in evidence. Ten women testified. Not one of them was impeached. Each apparently regretted having been compelled to take the stand. Not one disliked the doctor or the nurse. They may have feared the consequences of disobeying the

subpoena, but in any event they were believed by the jury and the court approved.

The report of each woman as to the occurrences at the time of her first call of the doctor is of the same pattern: she called at the Sunset premises; filled out a slip of paper; was admitted to the doctor's office; told him she thought she was pregnant; was escorted into an examination room; was given a manual pelvic examination; the doctor told her he believed her to be pregnant; they agreed upon the amount of the fee for the operation; she was told to go to 8001 at a certain time; she called at that address at the designated hour; was admitted to a room where she disrobed; donned a sanitary belt; placed the money on the cot or gave it to Mrs. Haskin; was escorted into another room; lay upon a table; was given a "shot" by Mrs. Haskin and lost consciousness. Upon regaining her senses in the room where she had disrobed, she found herself equipped with a sanitary napkin and a discharge came from the vaginal tract. Each witness visited Dr. Ames because she thought she was pregnant, and went to his office at 8001 for the purpose of effecting a miscarriage. Each had a restoration of the menstrual period about a month thereafter. In practically every instance the witness believed herself to be in good health. The doctor's charge for the service usually varied between $300 and $450. An increase over the latter sum was measured by the duration of the pregnancy, the anxiety of the patient and her ability to pay.

During January and February, 1955, Dr. Ames made examinations at the Sunset office but directed the witnesses to meet him at 8001. At most operations the surgeon did not appear while the patient was conscious,

but in the case of Anna Mae, she recognized the voice of Dr. Ames when, as he bore her back to the other room, he said: "Put your arm around my neck, honey." Mrs. Haskin subsequently told her that the doctor had carried her. Before visiting Dr. Ames, most of the witnesses had attempted to induce a miscarriage by imbibing castor oil, quinine or other medicinal concoctions, or jumping from an elevation. In each instance after the patient had disrobed preparatory to the operation, she was ordered by Mrs. Haskin to pay the fee prior to the injection about to be applied by the latter. When the nurse had difficulty in finding the vein into which she aimed to give the injection to Patricia, Dr. Ames entered the room to assist her. He kept no case records of the women served at 8001 whereas at the Sunset office he had history charts of more than 2000 patients.

Mrs. Haskin Assisted

That Mrs. Haskin participated in the abortions of at least three women at the Santa Monica Boulevard office is readily to be inferred from the established facts. Barbara, Jane and Dorothy testified that when they visited the 8001 premises, they met Nurse Haskin; that upon the latter's request they respectively paid her $400, $300 and $400; that they were given no receipts for such sums; that Nurse Haskin administered the anesthetic which rendered them unconscious.

Moreover, she negotiated with and performed the same services for Gaynel, Anna Mae and Patricia at the same office at the times charged in the information.

Ordinarily Mrs. Haskin and Miss Crow were the only nurses employed at the Sunset Boulevard office. However, only Mrs. Haskin worked with Dr. Ames at 8001

and there performed the services above specified for the witnesses.

Facts other than those given in the testimony of the abortees indicate the guilt of the accused. Dr. Ames rented the 8001 premises and paid the landlord her rent. He did not put his name on the door or otherwise display the fact that it was his professional retreat. While he contracted for a telephone for those premises, he kept its number unlisted. Notwithstanding the elaborate filing system in which he maintained detailed records of 2000 patients at the Sunset office, he kept no similar record of the women who testified that they had been aborted by Dr. Ames, assisted by Mrs. Haskin as nurse at 8001. After Barbara had paid $400 to Mrs. Haskin, the doctor told Barbara the agreed price was $450, and asked her to make a check for $50. It was introduced as exhibit 20. He gave neither Barbara nor any other confessed abortee a receipt for the fee paid for his service. When Officer Zander told him that he was under arrest for performing illegal abortions, the doctor said, "Well, where?" In reply to the questions of the officer, Dr. Ames stated that he had no office at 8001 Santa Monica Boulevard and that he never visited an office at that location. This false denial indicated a consciousness of guilt on the part of Dr. Ames. Also, it corroborated the testimony of the abortees. (People v. Malone, 82 Cal. App. 2d 54, 64; People v. Reimringer, 116 Cal. App. 2d 332, 337; People v. Morris, 110 Cal. App. 2d 469, 477.) Furthermore, Dr. Ames' failure to keep his usual detailed history charts with respect to the abortees tends to support their testimony. It evinces a conscious desire to conceal evidence of his illicit activities. (People v. Wilson, 25 Cal. 2d 341, 347.) The fact that in some

instances Dr. Ames bargained with the abortees with respect to his fee is calculated to establish the truth of their testimony. (People v. Smitherman, 58 Cal. App. 2d 121, 123; People v. Malone, *supra*, page 63.)

His establishment of an unadvertised office, the uniformity of procedure in cases of the witness-abortees; their being directed to meet the doctor at the remote place; the exhorbitant charges to young women for only two office calls; his failure to keep case records of the abortees; his giving no receipts—these circumstances taken with the confessions of the unfortunate women and other established facts leave no room for doubt that the corpus delicti of abortion was in each count proved and the evidence was clear that Dr. Ames and Mrs. Haskin were connected with the crimes.

The testimony of each of the ten women is mutually corroborative of the others in that it shows that each abortion was committed in a similar manner and the procedure followed in each instance was the same. (People v. Gallardo, 41 Cal. 2d 57, 64; People v. Kendall, 111 Cal. App. 2d 204, 210-211; People v. Allen, 104 Cal. App. 2d 402, 411.)

In so far as the evidence is concerned, the judgment will not be disturbed. A conviction by the trial court is, in the absence of prejudicial error, final, unless no inference can be drawn other than that the accused is innocent. The reviewing court will not determine the weight of the evidence but will approve the judgment unless it concludes that "under no hypothesis could sufficient facts have been found by the jury to warrant the inference of guilt." (People v. Newland, 15 Cal. 2d 678, 681. See also People v. Tedesco, 1 Cal. 2d 211, 219; People v. Spreckels, 125 Cal. App. 2d 507, 509.)

Probable Cause

At the commencement of the trial, appellants moved outside the presence of the jury to suppress the evidence on the ground that it was obtained through unlawful search and seizure. Appellants contend that the names of the witnesses and the exhibits had been obtained by police in searching the Sunset office without a search warrant and without probable cause. At the conclusion of the hearing, the court denied the motion and recalled the jury. The court then stated with reference to probable cause that in his opinion where there is a conflict in the evidence as to the facts on which the officers asserted the right to arrest without a warrant, the defendants are entitled to try the matter to a jury, notwithstanding that such issue had already been tried by the court sitting without a jury. Of course, in the instant action there was no conflict in the testimony of the witnesses called to prove probable cause. No witness contradicted Officer Zander's statements on which he based his belief. After announcing his view of the law, the court further said:

"Now, your representation to the court at this time that you waive the right to have the matter tried by the jury, at this time, in view of the fact that it was tried by the Court—.

"Mr. Parsons: No, we don't waive the right to have it tried by the jury.

"The Court: Well, that is what I want to clear up.

"Mr. Chotiner: After your Honor rules on the objection, and if the ruling should be adverse to the defendant, then at the proper time we can present such evidence as we might deem appropriate to present the issues to the jury.

"The Court: Just so we are clear on what we are doing. You may want to take this matter up, and I want the record clear as to what is going on. Nobody is waiving anything, and the Court is not asking them to."

Later the following occurred:

"The Court: Then, at the conclusion proper instructions will be submitted by you and given by the Court relative to the illegal search and seizure.

"Mr. Parsons: That is right.

"The Court: And you are at that time to argue it in your argument?

"Mr. Parsons: To the jury. . . .

"Mr. Grossman: The only thing I am concerned about now, Judge, is that I take it the jury will be fully instructed even though you are overruling the objection, nevertheless it is for their final consideration as to any questions of fact in determining these issues.

"The Court: Instructions will be given. That is going to make it difficult.

"Mr. Grossman: At the end of the trial.

"The Court: At the end of the trial they will be properly instructed, but not at this time. In other words, I presume you gentlemen have your instructions ready to submit to me, that I will either give or will not give. But in any event, I will give what I believe instructions are adequate to cover the entire subject as near as I can.

"Mr. Parsons: It is our job to help you out."

Thereupon, the attorneys severally gave their testimony, identified the exhibits taken from the Sunset office as the information cards they had filled out, or testified that they were similar to those on which they had written for the doctor's use. Also, the women identified (1) the ap-

pointment slips which had been received at the Sunset office instructing them when to meet the doctor at 8001, and (2) the instruction slips received by them at that office after they had regained consciousness.

At the conclusion of the testimony of the women, Officer Zander testified that prior to Dr. Ames' arrest he had information that witnesses Patricia, Dorothy and Mary had been aborted by the doctor on February 10 at 8001 Santa Monica Boulevard. Following a colloquy, the court instructed the jury that "This evidence is only on that question of whether or not there was an unlawful search and seizure; and for you to make a determination as to what the true facts are.

Officer Zander testified that he had observed the activities at 8001 from January 30 to February 10 and that he and his fellow officers had observed all but three of the abortees at that address; that he had received information from George Ruppers, investigator for the State Board of Osteopathic Examiners, on several occasions during the preceding two years; also from an investigator for a certain television program and from investigators for the district attorney. In addition to such intelligence, he had received information about the confessions of Patricia, Mary and Dorothy. This was to the effect that Mary, enroute with the officers to the City Hall, related in detail her experience of that morning at 8001 and told the cost of her operation. Similar statements were made to Officer Mitchell by Dorothy and Patricia. He relayed the information to Officer Golinda who in turn related it to Officer Zander near the Sunset office. It was then that the latter placed the doctor under arrest. Every officer who passed on the information of the confessions of the three women on February 10 was a reliable informant

(People v. Hood, 150 Cal. App. 2d ....., ...[2]), and that information alone was sufficient to give Officer Zander probable cause for making the arrest.

In line with their running general objection, appellants moved to strike as hearsay all the testimony received with reference to probable cause. The court had promptly reserved its ruling and appellants moved for a mistrial on the ground that the admission of hearsay evidence was violative of appellants' constitutional rights. Such motion having been submitted, was denied prior to the close of the trial.

Whose Error?

The contention that the court committed prejudicial error in denying the motions to strike the evidence and to grant a mistrial is without support. In the first place, the identical problem was determined in the court's trial in chambers in the question of probable cause. That decision was correct. (Pen. Code, Sec. 836, subd. 3; People v. Soto, 144 Cal. App. 2d 294, 298; People v. Boyles, 45 Cal. 2d 652, 656.) But it would have been error to submit this question to the jury had it not been for the consent given by both sides. (People v. Silvestri, 150 Cal. App. 2d ....., ...[3]; People v. Gorg, 45 Cal. 2d 776, 781; People v. Lawrence, 149 Cal. App. 2d ....., ...[4].) In the Silvestri decision, the appellate court supported its holding by citing People v. Gorg, and said that "the trial court should have determined the question as a matter of law." But, as previously shown, the submission of this

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[2]People v. Hood, 150 A. C. A. 208, 212.

[3]People v. Silvestri, 150 A. C. A. 118, 122-123 as modified by page 657.

[4]People v. Lawrence, 149 A. C. A. 501, 513.

matter to the jury in this case was pursuant to appellants' demand.

Now, what did Officer Zander tell the jury about his information that was prejudicial to appellants? He testified that (1) he had observed activities at the Santa Monica Boulevard office "for the days preceding the 10th"; (2) he had the information received from the Board of Osteopathic Examiners "in the preceding two or three years"; (3) he had information from Mr. George Ruppers (*supra*); (4) he had information from the District Attorney's investigators as far back as five years." In addition to the foregoing, Officer Zander had the confessions of three of the aborted women given to his fellow officer working on the identical matter. Had the jury tried only the question of probable cause, they could have concluded not otherwise than that Zander's arrest of Ames was justified by reason of the confessions of the three women, and if the case were tried again, it must be conceded that the same result would follow the jury's consideration. Therefore, how can it be said that appellants suffered any prejudice by the recitals of the officers of what had been told them by reliable informants? Moreover, the same women who had confessed to Officers Mitchell and Bates testified to the same facts as witnesses for the People on the question of the guilt or innocence of the defendants. The conclusion is unavoidable that the jury was impressed by this testimony and that no prejudice to the defendants resulted from Zander's summary thereof on the question of probable cause.

That the testimony of the abortees was amply corroborated and that the verdicts would have been the same had the jury not heard the evidence on probable cause is clearly demonstrated by reference to a few exhibits and to Dr. Ames' attempted explanation in reference thereto. At the

lower edge of most of the information slips were notations in turquoise ink such as: "5w-3-5-" or "5-4-100." Dr. Ames admitted that such notations were in his own handwriting.

Florence testified that she went to the Sunset office on January 3, filled out a slip, received a pelvic examination was informed she was pregnant and the fee for curettement would be $350. On January 16 she went to 8001 with $300 cash which she laid on the cot where she was undressing. She was then escorted to another room, given a hypodermic injection by the nurse and lost consciousness. Upon regaining consciousness, she wore a sanitary napkin and later had a bloody discharge from the vaginal tract. She testified that on about January 28 she mailed $25 to Dr. Ames. An envelope postmarked January 29, addressed to Dr. Ames at the Sunset office, marked "PERSONAL AND CONFIDENTIAL" bore Florence's return address. (Exhibit 18.) Officer Zander testified that such exhibit was seized in the search of the Sunset office. Florence identified it as the envelope in which she had mailed the money. At the bottom of her information slip (Exhibit 17) was the following notation: "6-7W — 350-pay 3 - 50 later." On the reverse side in the same ink was the following: "1-31-55-pd-25^{00} bal 25^{00}." After admitting the notations were in his handwriting, Dr. Ames gave the following explanation: "Well, offhand I cannot say definitely, but, I imagine it would mean that there were six or seven weekly treatments that she needed at 3.50 a treatment and all she could pay, all she had paid was $3.00 a treatment. I don't know." He denied that the notation meant "six or seven weeks pregnant, $350.00, paid $300, $50 later." With respect to the notation on the back he was asked: "Is that a memo of her having paid $25.00?" To which he replied: "It looks like it. It

possibly is. She did pay me $25.00." The flagrant falsity of this explanation is demonstrated by simple arithmetic. Seven weekly treatments at $3.50 would amount only to $24.50. Yet the physical evidence alone shows payment of $25 with a balance due of $25. This false explanation disclosed a consciousness of guilt and is legal corroboration of the witness.

One more example will suffice. Barbara testified that after filling out an information slip (Exhibit 19) at the Sunset office, she was given a pelvic examination by Dr. Ames. He told her she was three months' pregnant and that the price would be $450. On January 30 Barbara appeared at 8001 and had a conversation with defendant Haskin who told her to disrobe, and asked for the money. Barbara handed Mrs. Haskin $400 in $50 bills, whereupon Mrs. Haskin went into another room and returned with Dr. Ames who reminded Barbara that the price was $450. When she repeated her inability to get all the money, he asked whether she had a personal check. Whereupon Barbara wrote out a check for $50 payable to cash and handed it to either Dr. Ames or Mrs. Haskin. Barbara identified Exhibit 20 as the check, and Officer Zander identified it as having been seized in the search of the Sunset office. At the bottom of Barbara's information slip appears the following: "3m - 45 -." Thereafter, in a different ink written with a different pen appears: "owe $50.00 left ck." Dr. Ames testified both notations were in his handwriting. He had no definite recollection of what the notations meant but denied that they stood for "three month's pregnant. $450.00. owes $50.00. left check." He had no explanation of why the check dated January 30 and seized February 10 had not been cashed sooner.

There were other similar instances concerning which Dr. Ames either gave no explanation of the notations, or resorted to the fiction of weekly treatments at $3.00 or $3.50 each. Many appointment slips[5] given to the abortees were in evidence, all bearing Dr. Ames' notations in the familiar turquoise ink, indicating the day and hour of their appointments at the 8001 office. The requirement of douche, sanitary belt and sanitary pads is corroborative of the abortees' testimony that they went to 8001 for the purpose of effecting an abortion. The requirement that they were not to eat for six hours before arriving is corroborative of their testimony that they received an anesthetic.

Equally significant and corroborative is the instruction sheet[6] given to each abortee after regaining conscious-

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[5] "ADDRESS . . . 8001 SANTA MONICA BLVD. (2 blocks W. of W. of Fairfax.)
IMPORTANT . . . please call if you are not able to keep appointment.
Please try to be earlier than appointment.
Please do not eat 6 hours before coming.
Please Douche before coming.
Please bring Sanitary belt and pad . . . these are absolutely necessary.
Plan to stay about 1 hour. Someone can pick you up.
TIME..... DAY.....

[6] "ALL THIS IS NORMAL
1. You may have no spotting or discharge or flow.
2. You may have some spotting or discharge until your next period.
3. You may have some slight cramps.
4. You will menstruate in 4-6 weeks.
You may eat anything you wish now.
Do not lift anything heavy for one or two weeks.
Rest or take it easy for one or two days.

NOTIFY DOCTOR OF THE FOLLOWING SIGNS
1. Severe hemorrhage, more than heavy menstrual period.
2. Fever.
3. Severe cramps."

ness, particularly the forecast of menstruation in four to six weeks. Each of the women testified that her normal period was resumed as promised.

In addition to the overwhelming physical evidence connecting appellants with the crimes in such a manner as to indicate the abortees were telling the truth, it is now well settled "that there is sufficient corroboration if the independent testimony of the women shows that each abortion was committed in a similar manner." (People v. Gallardo, 41 Cal. 2d 57, 64, and cases cited therein.) Such is the situation in the matter at bar.

Taking the case, all in all, it is clear that there was no miscarirage of justice. That result in any trial may be declared "only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (Const. Art. VI, Sec. 4½; People v. Watson, 46 Cal. 2d 818, 836.) In view of the fact that appellants practically demanded that the court submit the question of probable cause to the jury and the evidence possessed by arresting officers and the probability that a retrial would necessarily result in the identical decision, it must be held that no prejudicial error resulted from the recitals of the officers concerning the origin of their information that gave them probable cause to make the arrest of Dr. Ames.

The same is true as to the arrest of Mrs. Haskin. While the testimony of an abortee involved nurse Haskin in the performance of each abortion, yet her daily life about the doctor's office and her efficient service in waiting upon the patients and in serving the doctor could leave no doubt that she was justifiably convicted of Counts II, IV and VIII under which the abortees named testified that Mrs.

Haskin had collected from them the moneys which the doctor had at first demanded as the price each should pay him to effect an abortion.

Appellants contend that prejudicial errors followed the rulings that the People's witnesses might testify (1) to the purpose of their going to the 8001 office and (2) to their beliefs that they were pregnant. No error was committed in permitting such evidence. Testimony of a woman as to her having gone to the doctor for the purpose of obtaining an abortion is admissible as bearing on the defendant's intent. (People v. Ramsey, 83 Cal. App. 2d 707, 723-724.) While pregnancy is no longer an issue in an abortion case in view of the deletion of such requirement from Penal Code Section 274 by the 1935 amendment, it is a circumstance which may be proved, if it exists. (People v. Califro, 120 Cal. App. 2d 504, 514, hearing denied, certiorari denied, 347 U. S. 950, 98 L. Ed. 1103, 74 S. Ct. 708.)

One further matter deserves attention. At the time of instructing the jury, at the request of the People the court read the following:

"You are instructed that the testimony of the woman upon whom the abortion was alleged to have been performed, if believed and meeting the requirements of the laws herein stated, is insufficient without corroboration to prove that the crime was committed. The corroboration required by law is such corroboration as tends to connect the defendant with the commission of the alleged crime as is further stated in my instructions."

When the jury returned to court for additional instructions, the court read the following:

"The elements of the crime of abortion known as corpus delicti, namely, the use of some means by an individual

with the intent to procure a miscarriage upon a woman, not necessary to preserve her life, may be shown by the testimony of the woman upon whom such act was committed without being corroborated by other evidence."

The foregoing was erroneous. The statute (Penal Code, Sec. 1108) itself requires the corroboration of an abortee. However, the corroboration in the instant case is so overwhelming that the language employed could not have caused a miscarriage of justice. It is not probable that a different result would have been reached by the jury had the error not occurred. (People v. Watson, 46 Cal. 2d 818, 836.)

The judgment is affirmed.

MOORE, *P. J.*

I concur:

ASHBURN, *J.*

APPENDIX "B".

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, v. Philip V. Ames and Ruth Haskin, Defendants and Appellants.

Crim. No. 5677. Dist. Court of Appeal—Second Dist.

Filed July 12, 1957. J. E. Brown, Clerk.

ORDER CORRECTING OPINION

THE COURT:

Good cause appearing therefor

IT IS ORDERED that the last paragraph of the opinion concluding with "People v. Watson, 46 Cal. 2d 818, 836" appearing in 151 A. C. A. at page 801 be stricken, and that in lieu thereof the following be substituted:

The instruction was correct. Section 1108 of the Penal Code says: "the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence." This is not contrary to the instruction which refers to the corpus delicti. Surely an abortee may prove the crime itself by her own testimony. It is only when she testified to the connection of the accused with the crime that she must be corroborated in order to justify conviction. (People v. Malone, 82 Cal. App. 2d 54, 61; People v. Sullivan, 113 Cal. App. 2d 510, 524; People v. Hickok, 28 Cal. App. 2d 574, 580-581.)

APPENDIX "C".

"The Court: I just want to at this time for the purpose of the record say that it is the court's opinion that where there is a conflict in the evidence with respect to the facts, that the defendants have the right to try the matter by jury notwithstanding the fact that it was tried by the court sitting without a jury." [R. T. p. 294; Certified Record, Vol. II.]

This remark, we say, makes it certain that it was the trial court's idea to submit the issue of probable cause to the jury and in this procedure the District Attorney fully concurred. He made no objection. It was his duty to see that the rights of both the People and defendants were protected. In fact, he did not know what procedure to take and so stated. He offered the evidence. [R. T. p. 961.] Later the District Attorney said this: [Certified Record, Vol. II].

"Mr. Busch: Well, I will tell you, your Honor. I don't know whether I should go into the testimony of this officer relative to the reasonableness of the grounds for his arrest before I offer the exhibits or not.

Mr. Parsons: Well, you have already offered them and have already gone into the reasonableness of the arrest at least in part. You already asked him some questions. Of course, now that he has offered these I am about to object.

The Court: I know what you are going to object to and that is why I called you up to the bench because it puts you in the place where you have to make that objection.

Mr. Parsons: That's right. I can't help myself—

Mr. Busch: *I want to be sure of the procedure. This is all new.*

The Court: I am not sure but that seems to be the logical way to do it—

Mr. Parsons: *So there won't be any mistake about this, we want the record to show that we* object to the testimony of Zander—

Mr. Busch: I don't know what procedure to use. [R. T. pp. 965-967.] (Emphasis ours.) [Certified Record, Vol. II.]

The District Attorney even stated as follows:

"Mr. Busch: I am anticipating an objection to the evidence and it is not offered for the truth of the matter necessary as asserted but on the question of reasonable cause of the officer to make the arrest.

Mr. Parsons: I am not trying to avoid—

The Court: Wait a minute.

Mr. Parsons: If we can have a running objection, I am with you on that.

The Court: *I want you to preserve your record. Don't misunderstand me. I am going backward to let you keep your record straight.* (Emphasis ours.) [R. T. p. 971.]

In this same conversation at the bench, this took place between counsel and the court:

"Mr. Parsons: Yes. I hate to keep interrupting. It is a bad thing.

Mr. Busch: The only thing I anticipate—I anticipate asking everything along those lines.

Mr. Parsons: May it be understood that the objection is made to each and every question.

The Court: Is there any objection that you gentlemen might have of my instructing the jury that this

evidence is being taken only on the question of unreasonable search and seizure, and the evidence received on that at this time is only on that point? Do you see anything wrong with that in my instructing them?

Mr. Parsons: I see nothing wrong with that, your Honor.

The Court: Supposing I instruct them that this evidence of this officer and these exhibits be taken on the question of the facts related to the unlawful search and seizure.

Mr. Busch: *I feel that for the record, and I don't know what procedure to use—*

The Court: *No one does. We don't have anything to go by.* (Emphasis ours.)

Mr. Busch: We are putting a foundation in.

The Court: *We are cutting the timber, we might say, and not shooting in the dark, but cutting the timber.* (Emphasis ours.)

Mr. Parsons: I'll never use that expression again, but I want it clearly understood, you have attempted to help us preserve the record, but I do think that it can be understood we have a running objection upon the grounds stated to the testimony of this officer as to each question asked of him on this subject.

Mr Busch: Yes, on this subject-matter, I will stipulate to that.

The Court: Let me make this one suggestion: Supposing I tell them this, that the evidence of Mr. Zander, that is Officer Zander, is being received only on the question of unlawful search and seizure, on that issue, and that they will have to settle all the facts.

Mr. Busch: You don't know whether you are going to sustain the objection.

The Court: We are anticipating. I don't know yet.

Mr. Parsons: If it becomes a matter for them to determine.

The Court: They are going to hear the facts and apply the facts to the law as I am going to instruct them on the law.

Mr. Busch: Well—

The Court: And then you state you have your running objection to it, and we can go from there. They are just fumbling in the dark. They don't know what is going on. The only way we can clarify it is by telling them what we are doing.

Mr. Parsons: Very well.

Mr. Busch: That's all right with me, your Honor. [R. T. pp. 971-974.]"

Whereupon counsel returned to their seats at the counsel table from the conference at the bench, and in open court and within the presence and hearing of the jury the court said, among other things, the following [R. T. p. 974]:

"The Court: Ladies and gentlemen of the jury, I first want to say that many of these conferences at the bench have been not for the purpose of keeping you in the dark, because there are questions of evidence that sometimes arise that must be discussed before they are ruled upon.

In this case, we have raised an issue as to the unlawful search and seizure, as you no doubt have suspected long before now. In that type of a case, where there is a question as to the facts, the jury has the duty of determining the facts on the question of unlawful search and seizure independent of the question of the guilt or innocence of the other parties. Do you understand? Do you follow me that far?

Now, as you determine the facts, you will apply to those facts the law I give and arrive at a conclusion whether or not there has been an unlawful search and seizure, and if so, then there is certain evidence you will have to exclude. The evidence of Officer Zander at this time, and the evidence that has been taken since Mr. Busch started in on this line of questioning, at which time I have told you you would be specially instructed is solely considered by you on that question, and that question alone. That is the question of unlawful search and seizure alone, and not on the guilt or innocence of these two parties.

Do you understand me? If not, I will try to make it clearer, though I don't know how I can, but maybe I can try.

You understand your function throughout the case is always to determine the facts and then apply the law as given to you by the Court as he believes it to be by the cases and the statutes.

So, in this one, you have got something here that I don't think another jury in the State of California has had the opportunity or the burden of deciding, and that is this one question. So far the Courts have had to wrestle with it. This evidence is only on that question of whether or not there was an unlawful search and seizure, and for you to make a determination as to what the true facts are, as there will be a conflict in the evidence as to what the facts are, or were surrounding this arrest. It has not come up as yet, but that is the way the evidence will develop, I am fairly certain. Do you understand that? (Emphasis ours.)

Mr. Parsons: Now, may it be understood, your Honor, that our objection has been made to the testimony of the

officer in its entirety, as to these exhibits, and that it is a running objection upon the grounds heretofore stated, that it is in violation of the Fourth Amendment to the United States Constitution and amounts to a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and a violation of Article I, Section 19, of the Constitution of the State of California, and that it was an unreasonable arrest, unreasonable search and seizure, and may it be understood, so that we are not in a position of having to object to every question and prolonging this matter, that it may be a running objection?

The Court: To all of this testimony of this officer at this time?

Mr. Parsons: Upon this issue.

Mr. Grossman: I think the record shows both defendants have made an objection.

The Court: Well, I want the record perfectly clear on it. Is that satisfactory to you, Mr. Busch?

Mr. Busch: That is satisfactory to me, your Honor.

The Court: All right. Leave us proceed." [Rep. Tr. pp. 974-976.]